

The Financing of Local Housing Authorities: A Contract Approach for Public Corporations*

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Introduction

The public housing program has been run by Local Housing Authorities (LHA's) since the program began in 1937.¹ When constructing new units LHA's float tax-free bonds, guaranteed and subsidized by the federal government.² Ongoing operating costs were, until 1969, generally satisfied by rental revenues without financial assistance from the federal government.³ During 1969, Congress dramatically altered the system of federal obligations and subsidies for LHA's in two ways: it passed the Brooke Amendment limiting a tenant's rent in public housing to twenty-five percent of a tenant's income;⁴ at the same time, Congress authorized federal funds for the ongoing operating deficits as well as the construction debts in LHA's.⁵

The new system for financing public housing is now in shambles. The limitation on tenant rentals, combined with rising operating costs, has caused LHA's to run large operating deficits.⁶ However, Congress

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1. 42 U.S.C.A. §§ 1401-36 (Supp. 1973).

2. The Department of Housing and Urban Development (HUD) makes annual contributions covering the repayment of interest and principal on LHA bonds. See NATIONAL INSTITUTE FOR EDUCATION IN LAW AND POVERTY, HANDBOOK ON HOUSING LAW, ch. IV, Pt. II, at 5-9 (1971).

3. HUD limited annual contributions generally to capital costs. HANDBOOK ON HOUSING LAW, *supra* note 2, at 9. However, special operating subsidies were authorized to provide housing for the elderly, large families, certain displaced families, or families of unusually low incomes. 42 U.S.C. § 1410(a) (1970).

4. Housing and Urban Development Act of 1969, Pub. L. No. 91-152, § 213(a), 83 Stat. 389, amending 42 U.S.C. § 1402(1) (1964) (codified at 42 U.S.C. § 1402(1) (1970), as amended, 42 U.S.C. § 1402(1) (Supp. I, 1971)).

5. *Id.* § 212(a). This act increased HUD's contract authorization by \$75 million and earmarked it for operating subsidies. H.R. REP. NO. 91-470, 91st Cong., 1st Sess. 30-32 (1969).

6. For example, the LHA in Portland, Oregon, has lost thirty percent of its rental revenues since the Brooke Amendments, and has had an operating deficit of \$610,000 per year. King, *Cities Losing on Aid for Housing Poor*, N.Y. Times, Nov. 25, 1972, at 17, cols. 2-3.

Figures for operating deficits incurred by LHA's used in this article are from the New York Times and the National Association of Housing and Redevelopment Officials

has not appropriated enough funds specifically to meet these deficits,⁷ and the executive branch has refused to satisfy the need from other eligible appropriations.⁸ As a result, many LHA's face imminent bankruptcy.⁹

The current fiscal crisis in public housing has important implications for an increasing number of public corporations¹⁰ which, like LHA's,¹¹ exist as legal hybrids between government agencies and private companies. Similar public corporations may be chartered by the state, *e.g.*, the New York Port Authority,¹² or by the federal government, *e.g.*, the Tennessee Valley Authority (TVA).¹³ In contrast to government agencies, these public corporations are distinct legal entities without sovereign immunity.¹⁴ They maintain their own treas-

(NAHRO). Efforts to obtain HUD figures on aggregate deficits claimed by LHA's were unsuccessful, either because HUD does not compute such figures or does not release them to the public.

7. Congressional appropriations earmarked for operating subsidies were below the estimated need for such subsidies by \$19.6 million in fiscal 1970, \$92 million in fiscal 1971, \$103 million in fiscal 1972, and \$155.4 million in fiscal 1973. Compare col. (5) with col. (9) in the Chart of App., *infra*.

8. The line item appropriation for operating subsidies is under the general heading of "Low-rent public housing" in the United States Budget, which includes other line items such as new construction for public housing. HUD officials felt free to juggle funds among line items in fiscal 1972 and fiscal 1973. See col. (7), Chart of App. *infra*. But the funds reallocated by HUD together with the earmarked appropriations for operating subsidies still fell short of LHA operating deficits by \$82 million in fiscal 1971, \$43 million in fiscal 1972, and \$55 million in fiscal 1973. Compare col. (8) with col. (9) in Chart of App., *infra*.

9. The Public Housing Financial Crisis: Cause and Effect, NAHRO Bulletin, Sept. 29, 1972.

10. For a general discussion of public corporations in America, see Abel, *The Public Corporation in the United States*, in GOVERNMENT ENTERPRISE 181 (W. Friedmann & J. Garner eds. 1970).

The fiscal crisis for LHA's may also have implications for non-profit corporations, a topic beyond the scope of this article. However, non-profit corporations may be distinguished from quasi-public corporations on legal and policy grounds. Most non-profit corporations are registered under a general state incorporation act or a general non-profit incorporation act, as opposed to a special act of the legislature. H. OLECK, NON-PROFIT CORPORATIONS AND ASSOCIATIONS 127-44 (1956). Non-profit corporations are typically run by boards elected by members or trustees rather than appointed by state or federal governments. *Id.* at 270-71.

Moreover, the policy reasons for non-profit corporations are mainly the promotion of pluralistic "giving" and neighborhood control, in contrast to the key policy goal of business-type management in quasi-public corporations. For a discussion of the policy questions for non-profit corporations in the housing field, see P. NIERANCK & J. POPE, RESIDENTIAL REHABILITATION: THE PITFALLS OF NON-PROFIT SPONSORSHIP ch. 10 (1968).

11. This article will employ as a paradigm corporate charter for LHA's the legislation on local housing authorities in Wisconsin. WISC. STAT. ANN. §§ 66.40-66.404 (1965).

12. See generally N.Y. UNCONSOL. LAWS §§ 6401-7154 (McKinney 1961).

13. See generally 16 U.S.C. §§ 831-831d(d) (1970).

14. A LHA is "a public body corporate and politic," WISC. STAT. ANN. § 66.40(4)(a) (1965), which can sue and be sued in its own name. WISC. STAT. ANN. § 66.40(9)(n) (1965). The New York Port Authority is "a body corporate and politic," N.Y. UNCONSOL. LAWS § 6404 (McKinney 1961), against which the state consents to suits. N.Y. UNCONSOL. LAWS § 7101 (McKinney 1961). The TVA is "a body corporate," 16 U.S.C. § 831 (1970), which can sue and be sued. 16 U.S.C. § 831c(b) (1970).

uries and hold property in their own names.¹⁵ Their board members are usually non-partisan appointees, outside the civil service regulations, with significant protection against removal.¹⁶ In contrast to private companies, these public corporations are established by special legislative act and are operated by boards appointed by a governmental official.¹⁷ Government appropriations provide initial capital to these corporations, though they also float bonds.¹⁸ They usually make payments in lieu of taxes and send annual reports to the chartering governmental body.¹⁹

Because public corporations are legal hybrids, the legal status of their financial agreements with any government body is problematic. Private companies bargain at arm's-length over contracts which are binding on the government,²⁰ while government agencies have no "enforceable" agreements with each other or the chief executive.²¹ But public corporations, such as LHA's, are in the middle—heavily dependent on government subsidies, but intended to operate as independent legal entities.²²

Government officials are currently attempting to treat certain public corporations as parts of government agencies whose subsidies can be reduced or eliminated as matters of executive discretion.²³ But such

15. WISC. STAT. ANN. § 66.40(9)(m) (reserve and sinking funds) and § 66.40(9)(i) (1965) (hold property); N.Y. UNCONSOL. LAWS § 7002 (general reserve fund), § 6407 (McKinney 1961) (hold property); 16 U.S.C. § 831c(f) (1970) (treasury and hold property).

16. WISC. STAT. ANN. § 66.40(5) (non-partisan and determine own qualifications and compensation for employees) and § 66.40(8) (1965) (removal for cause after formal hearing); N.Y. UNCONSOL. LAWS § 6415 (McKinney 1961) (shall fix own qualifications and duties for employees), and Goldstein, *An Authority in Action—An Account of the Port of New York Authority and Its Recent Activities*, 26 LAW & CONTEMP. PROBS. 715, 717 (1961) (non-partisan board and removal for cause); 16 U.S.C. § 831c (1970) (non-partisan), § 831b (1970) (no civil service requirement), and § 831c(f) (1970) (removal by concurrent resolution of Congress).

17. WISC. STAT. ANN. § 64.40(4) (creation) and § 66.40(5) (1965) (appointed by municipal government); N.Y. UNCONSOL. LAWS § 6403 (creation) and § 6405 (McKinney 1961) (appointment of Commissioners half by New York State and half by New Jersey State); 16 U.S.C. § 831 (creation) and § 831a (1970) (appointed by President with advice and consent of Senate).

18. WISC. STAT. ANN. § 66.40(21) (federal financing), § 66.40(2) (municipal financial assistance) and § 66.40(13) (1965) (issue bonds); N.Y. UNCONSOL. LAWS § 6416 (appropriations for expenses) and § 6459 (McKinney 1961) (issue bonds); 16 U.S.C. § 831z (appropriations authorized) and § 831n (1970) (issue bonds).

19. WISC. STAT. ANN. 66.40(1) (payments in lieu of taxes) and § 66.40(23) (1965) (annual reports to municipality); N.Y. UNCONSOL. LAWS § 6971 (payments in lieu of taxes) and § 6408 (McKinney 1961) (annual report to state legislature); 16 U.S.C. § 831i (1970) (payment in lieu of taxes and annual report to Congress).

20. See generally G. CUNEO, *GOVERNMENT CONTRACTS HANDBOOK* (1962).

21. Unless the shifting of funds violates a mandatory duty. *Work v. United States ex rel. Rives*, 267 U.S. 175 (1925).

22. For example, the legal constraints on the Post Office, a newly created public corporation, are set by the rate levels approved by Congress. Since these rate levels are too low to generate a yearly profit, the Post Office must receive financial assistance of some kind from the government. See generally 39 U.S.C. § 101-5605 (1970).

23. See, e.g., argument by government on the cross-claim, *Brief for HUD, Barber v. White*, Civ. Action 15,235 (D. Conn., filed Jan. 26, 1973), maintaining that HUD has almost total discretion over operating subsidies to LHA's.

treatment undercuts one of the key legislative purposes of these corporations—the promotion of business efficiency through decentralized decision-making.²⁴ When the provision of adequate subsidies becomes uncertain, public corporations cannot rationally plan existing programs or embark on innovative ones.²⁵ Moreover, a high risk of non-payment is likely to induce private suppliers to increase their charges for goods and services. The legislature could, of course, eliminate public housing or any program carried out by a public corporation. It could also transform public corporations into parts of a government agency. But so long as these programs are retained within their current legal framework, the task is to structure a system for providing operating subsidies that will allow public corporations to reap the benefits of decentralized decision-making while at the same time maintaining some accountability to the government.

This article will examine the fiscal problems of LHA's as a case study in the financing of public corporations. The legislative and executive roots of the fiscal crisis now facing LHA's will be explored. The barriers to resolving this crisis through administrative law will then be considered. Finally, a contract approach, supplemented by a funding formula, will be suggested for dealing with the financial problems of public corporations.

I. Federal Roots of the Fiscal Crisis

The advantages of decentralized decision-making for LHA's have been severely undercut by the uncertainties of government funding. Congress only gradually faced up to the fiscal implications of its substantive legislation on public housing. The Department of Housing and Urban Development (HUD) moved even more slowly in making full use of congressional authorization. When HUD finally began to push for adequate operating subsidies, it was blocked by the Office of Management and Budget (OMB).

A. *Legislative Irresponsibility*

To improve the plight of the low-income residents of public housing, Congress in 1969 limited tenant rentals to twenty-five percent of

24. The House committee report on the TVA, for example, stated: "We intend that the corporation shall have much of the essential freedom and elasticity of a private business corporation." H.R. REP. NO. 130, 73d Cong., 1st Sess. 19 (1933). Similarly, a New York State Commission said that the quasi-public corporation form would "provide a more flexible administrative instrument to manage commercial type public enterprises," *quoted in* Abel, *supra* note 10, at 190.

25. For instance, tenant counseling services may now be included in the computation of operating costs by LHA's. HUD Circular HM 7475.9, Feb. 10, 1972. However, if LHA's cannot be assured of receiving operating subsidies, they will not embark on tenant counseling.

tenant income.²⁶ In 1970 Congress further reduced the rents of LHA residents by defining more stringently the income base to be used in calculating the twenty-five percent limitation on tenant rentals.²⁷ In 1971 Congress finished the legislative trilogy by making clear that welfare recipients were to be covered by the twenty-five percent rule.²⁸

To help compensate LHA's for the mandated rent reductions Congress authorized the payment of operating subsidies in HUD's annual contributions to LHA's in 1969 and in 1970.²⁹ It also authorized the amendment of the Annual Contributions Contract (ACC) between HUD and every LHA:³⁰

- (1) to assure the low-rent character of the projects involved, and
- (2) to achieve and maintain adequate operating and maintenance services and reserve funds including payment of outstanding debts.

Although the attempt to reduce the rental burden of public housing tenants may have been laudable, the legislators failed to cope with the fiscal implications of their statutory reforms. First, the authorized funds for operating subsidies were originally insufficient to meet the extra cost imposed by the twenty-five percent limitation on tenant rentals.³¹ In fiscal year 1972, for example, the authorized funds earmarked for operating subsidies totaled \$185 million, as compared to the estimated loss in LHA revenues of \$200 million caused by the three Brooke Amendments.³² Only in the middle of fiscal year 1973 did Congress increase the statutory maximum for annual contributions earmarked for operating subsidies to a level above actual revenue lost under the three Brooke Amendments.³³

26. Housing and Urban Development Act of 1969 § 213(a), 42 U.S.C. § 1402(1) (1970) as amended, 42 U.S.C. § 1402(1) (Supp. I, 1971).

27. Housing and Urban Development Act of 1970 § 208(a), 42 U.S.C. § 1402(1) (1970) as amended, 42 U.S.C. § 1402(1) (Supp. I, 1971).

28. Housing and Urban Development Act of 1971 § 9, 42 U.S.C. § 1402(1) (Supp. I, 1971).

29. Housing and Urban Development Act of 1969 § 212(b), 42 U.S.C. § 1410(e) (1970), as amended, 42 U.S.C.A. § 1410(e) (Supp. 1973).

For a history of earmarked authorizations, see App. *infra*.

30. 42 U.S.C. § 1410(a) (1970). The ACC's are standard contracts signed by both parties before any projects are started and contract amendments are added for every new project.

31. For example, the LHA of Oklahoma City, Oklahoma, has an annual deficit of \$400,000 in excess of operating subsidies, caused in large part by average reductions in rent from \$43 per month to \$22 per month since the Brooke Amendments. King, *Cities Losing on Aid for Housing Poor*, N.Y. Times, Nov. 25, 1972, at 17, cols. 2-3.

32. For the \$185 million authorization, see App. *infra*. For the \$200 million estimate on the Brooke Amendments, see speech by Secretary of HUD, George Romney, Annual Convention of the Mortgage Bankers of America [hereinafter cited as Romney speech], quoted in Memorandum of Points and Authorities in Support of Plaintiff's Motion for Preliminary Injunction at 34, NAHRO v. Romney, Civ. Action No. 2080-72 (D.D.C., filed Dec. 19, 1972) [hereinafter cited as Memorandum of Points].

33. Pub. L. No. 92-503, 86 Stat. 906, amending 42 U.S.C. § 1410(e) (1970) (codified at U.S.C.A. § 1410(e) (Supp. 1973)). See App. *infra*, especially col. (4) in Chart.

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Second, the funds authorized for operating expenses were geared only to the *extra* costs imposed by the Brooke Amendments. But LHA and HUD officials had warned Congress that local housing projects were rapidly becoming insolvent *before* the passage of the Brooke Amendments.³⁴ Two independent studies of LHA's showed that operating costs between 1965 and 1968 had risen by 6.9 percent per annum, mainly as a result of inflation.³⁵ Revenues of LHA's had not kept pace with these rises in operating costs despite large increases in rental charges. For example, from 1952 to 1967 rents of the New York City Housing Authority increased by 71.6 percent, but operating costs rose by 125.6 percent.³⁶

Third, Congress deferred to the limited funding requests of HUD³⁷ rather than exercising its power to appropriate all the money authorized for operating subsidies.³⁸ Thus, despite an authorization of \$185 million toward the operating expenses of public housing in fiscal year 1971, Congress appropriated only \$108 million.³⁹

B. *Administrative Recalcitrance*

While implementing the Brooke Amendments⁴⁰ and other costly modifications in standard LHA leases,⁴¹ HUD officials resisted payment of operating subsidies to LHA's.⁴² In 1969, Congress authorized an additional \$75 million "to cover the amount by which the appropriate rental charges exceed 25 percent of the income of the tenant and to cover the cost of adequate operating and maintenance services"⁴³ Yet in 1969 HUD did not ask for any appropriations

34. Walsh, *Is Public Housing Needed for a Fiscal Crisis?*, 26 J. OF HOUSING 64 (1969); see also Romney speech, *supra* note 32.

35. See F. DE LEEUW, OPERATING COSTS IN PUBLIC HOUSING: A FINANCIAL CRISIS 12, 27 (1970) and R. RYDELL, FACTORS AFFECTING MAINTENANCE AND OPERATING COSTS IN FEDERAL PUBLIC HOUSING PROJECTS 17 (1970).

36. Walsh, *supra* note 34.

37. See p. 1214 *infra*. Compare col. (5) with col. (6) in Chart of App. *infra*.

38. Prior to passage of an appropriation by the Appropriations Committee, an authorization must be approved by the committee with substantive jurisdiction and passed by Congress. In the housing field, the authorizing committee is the Banking and Currency Committee.

39. BUDGET OF THE UNITED STATES FOR FISCAL YEAR 1973—APPENDIX 511 (1972). See cols. (4) and (8) for fiscal 1971 in Chart of App. *infra*.

40. See, e.g., HUD Circular RHM 7465.19, Apr. 24, 1970.

41. See HUD Circular, RHM 7465.6, Aug. 10, 1970. This HUD circular eliminated from LHA leases many clauses such as confession of judgment, waiver of legal notice, and waiver of jury trial. Later HUD prohibited tenant surcharges for excessive use of utilities in projects with master meters. HUD Circular, RHM 7465.7, Feb. 1, 1971. Also, the courts now require an adversary-type hearing before LHA tenants can be evicted, which imposes another set of expenses on LHA's. See *Escalera v. Housing Authority*, 425 F.2d 853 (2d Cir. 1970).

42. See Romney speech, *supra* note 32.

43. H.R. REP. NO. 91-740, 91st Cong., 1st Sess. 30 (1969). Congress also indicated disapproval of HUD's traditional limitation of annual contributions to operating subsidies by passing an amendment in 1969 which made clear that annual contributions should "not [be] limited to debt service requirements" 42 U.S.C. § 1410(b) (1970).

from this additional authorization. When Congress authorized the inclusion of operating costs in the ACC's during the 1970 legislative session, the Conference Report criticized HUD for inaction on operating subsidies to LHA's.⁴⁴ But HUD declined to amend the relevant sections of the ACC's.

Even after fiscal 1971, when HUD did seek appropriations to cover operating subsidies out of the additional authorizations, the requests were often below the sums that had been authorized.⁴⁵ There is little doubt that the Committee would have deferred to higher requests on the basis of HUD's expertise.⁴⁶ In fiscal 1972 the Committee requested that HUD submit a supplemental estimate on operating subsidies because the sum asked for was so obviously inadequate.⁴⁷ HUD did not comply with the request.

To provide more operating subsidies without expending more money on public housing, HUD finally shifted funds from other aspects of public housing, like new construction, to operating subsidies.⁴⁸ But the Office of Management and Budget (OMB) opposed shifting funds⁴⁹ in sufficient amounts to fill the gap between the earmarked appropriation for operating subsidies and the aggregate operating deficit of LHA's.⁵⁰ As a result, HUD was forced to reduce operating subsidies to levels substantially beneath the deficits incurred by individual LHA's during fiscal years 1972 and 1973.⁵¹

44. H.R. REP. NO. 91-1784, 91st Cong., 2d Sess. 59 (1970).

45. Compare col. (4) with col. (5) in Chart of App. *infra*.

46. Compare col. (5) with col. (6) in Chart of App. *infra*. The Budget for fiscal year 1973 stated as to authorizations for public housing:

This authority, under the legislation, is available for use without specific appropriation action although the budget program is subject to Congressional review. BUDGET OF THE UNITED STATES FOR FISCAL YEAR 1973—APPENDIX 489 (1972). The historic deference of the Appropriations Committee to HUD requests on public housing was reaffirmed by congressional officials. Telephone interview with Mr. Maurice Pujol of the Senate Committee on Appropriations (Jan. 5, 1973), and telephone interview with Mr. Alex Hewes of the Senate Committee on Banking, Currency, and Urban Affairs (Jan. 6, 1973).

47. S. REP. NO. 820, 92d Cong., 2d Sess. 11 (1972).

48. On October 6, 1972, HUD announced that \$100 million more than the actual appropriations would be spent on operating subsidies. HUD Secretary Romney Adds 100 Million Dollars to Operating Subsidy Funds for Public Housing, NAHRO Bulletin, Oct. 13, 1972. For other reallocations, see App. *infra*.

49. [F]unds sufficient to have met LHA's demands for fiscal 1972 . . . have been held back in the amount of 44 million dollars by OMB. NAHRO Takes Action to Save Homes for Million Low Income and Elderly Families, NAHRO Bulletin, Aug. 9, 1972 [hereinafter cited as NAHRO Takes Action].

[T]he office of Management, which must authorize all Federal Expenditures, has refused to release all of the subsidies the local authorities contended they were due under the Brooke Amendment. King, *Cities Lose on Aid for Housing Poor*, N.Y. Times, Nov. 25, 1972, at 1, col. 5 & at 17, col. 2.

50. Compare col. (8) with col. (9) in Chart of App. *infra*.

51. For example, HUD failed to provide \$290,000 claimed by the housing authority of Tulsa, Oklahoma, for fiscal 1972. Response to Public Housing Operating Subsidies Crisis

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One key legal weapon employed by HUD to curtail operating subsidies was § 1410(b), which limited "fixed annual contributions" to the yearly yield at a specified interest rate on development cost.⁵² After the National Association of Housing & Redevelopment Officials (NAHRO) filed suit against applying the § 1410(b) limitation to operating subsidies,⁵³ Congress repealed the section by a joint resolution in 1973.⁵⁴ However, HUD with the help of OMB then promulgated new funding procedures,⁵⁵ still pegged to annual contributions as computed under § 1410(b).⁵⁶

II. Local Response Through Administrative Law

To offset their deficits, LHA's have used up reserves, ceased maintenance of units, and raised rentals of tenants.⁵⁷ As the effectiveness of these stop-gap measures has been exhausted, they have attempted to obtain injunctions in the nature of mandamus ordering HUD to provide more operating subsidies for LHA's.⁵⁸ Tenants, meanwhile, have brought suits against LHA's for statutory violations.⁵⁹ The legal measures taken by LHA's as well as the countermeasures taken by tenants have proceeded on theories of administrative law. The net

Grows as Administrative Position Hardens, NAHRO Bulletin, Oct. 6, 1972. There have also been reports of uncompensated operating deficits for LHA's of \$2 million in Boston; \$5 million in Chicago; \$3 million in Baltimore, Maryland; \$1.5 million in Buffalo, New York; \$3.5 million in Allegheny County, Pennsylvania. King, *Cities Lose on Aid for Housing Poor*, N.Y. Times, Nov. 25, 1972, at 17, cols. 2-3.

52. 42 U.S.C. § 1410(b) (1970).

53. Complaint at 22-3, NAHRO v. Romney, No. 2080-72 (D.D.C., filed Oct. 16, 1972). NAHRO maintained that HUD could provide operating subsidies which varied from year to year, above the "fixed annual contribution" of § 1410(b) geared to construction subsidies.

54. Before the court could decide on NAHRO's argument, Congress eliminated the § 1410(b) limitation by a joint resolution. Pub. L. No. 92-503, § 3(2), 86 Stat. 906, amending 42 U.S.C. § 1410(b) (1970) (codified at 42 U.S.C.A. § 1410(b) (Supp. 1973)).

55. Subsidies for Operations: Low-Rent Public Housing Program, HUD Circular HM 7475.12, Nov. 28, 1972 [hereinafter cited as Subsidies for Operations].

56. See generally New Public Housing Operating Subsidy Formula, 2 Law Project Bulletin #2, at 6-11, Dec. 15, 1972 (mimeograph).

The new uniform funding procedures contravene the prime purpose behind the congressional joint resolution. The "uniform" funding scheme is pegged to project budgets for the last half of fiscal 1971 and the first part of fiscal 1972. HUD Circular H.M. 7475.12, 3(a)(1)(a), Nov. 28, 1972. Since the § 1410(b) limitation was in effect during these two fiscal years, HUD has implicitly continued a statutory provision overruled by Congress. The continued reliance on this statutory provision is justified by HUD on the entirely unsupported assertion that "Departmental assurance was given that the elimination of this restriction would be utilized only in cases where the Housing Authority is faced with a severe financial emergency." *Id.* at 5(a).

57. NAHRO Takes Action, *supra* note 49. Also, LHA's have deferred payments in lieu of taxes, allowed vacancies to occur, stopped utility payments and sold equipment. *Id.*

58. See Memorandum of Points, *supra* note 32.

59. See, e.g., *Boynes v. Marsh*, No. 570 (E.D. Mich., filed May 5, 1972).

result of these cases is that tenants can enforce statutory obligations on LHA's, but LHA's cannot require the government to provide adequate financing.

A. *Tenants vs. LHA's*

Attempts by LHA's to "ignore [the] Brooke Amendments"⁶⁰ were barred in *Barber v. White*,⁶¹ the only tenant-LHA litigation reported thus far.⁶² In *Barber*, the New Haven Housing Authority (NHHA) admitted that its rents exceeded the twenty-five percent statutory ceiling but argued that the limit, absent federal reimbursement, amounted to a taking of property without due process of law.⁶³ District Court Judge Newman rejected this NHHA argument:⁶⁴

The unappealing but blunt fact is that nothing in the Act nor any judgment of this Court enforcing the Act requires the NHHA to continue in operation . . . as long as the NHHA is operating with federal funds and pursuant to federal law, the provisions of federal law will be strictly enforced.

Judge Newman correctly reasoned that although the rents charged welfare recipients by the NHHA were set according to state law,⁶⁵ the Supremacy Clause requires state law to be subordinated to federal requirements.⁶⁶ If the federal requirements are too onerous, then NHHA can simply go out of business.⁶⁷ After all, states may effec-

60. NAHRO Takes Action, *supra* note 49.

61. *Barber v. White*, Memorandum of Decision on Motion for Partial Summary Judgment, Civil Action No. 15,235 (D. Conn., filed Nov. 28, 1972) [hereinafter cited as Memorandum of Decision]. This decision is summarized in 41 U.S.L.W. 2301-02 (Dec. 12, 1972).

62. See also *Okinello v. Alaska State Housing Authority*, No. A-13372-Civ. (D. Alas., filed Aug. 18, 1972).

63. See Memorandum of Decision, *supra* note 61. To support this argument, NHHA relied on cases which protected railroads from federal and state orders requiring continued operation at a loss on the grounds of the Fifth and Fourteenth Amendments. See, e.g., *Railroad Comm. v. Eastern Tex. R.R.*, 264 U.S. 79 (1924) and *In re New York, New Haven and Hartford Railroad Co.*, 304 F. Supp. 793, 801 (D. Conn. 1969). See also Note, *Takings and the Public Interest in Railroad Reorganization*, 82 YALE L.J. 1004 (1973). This argument was made by LHA's in other cases. See, e.g., *Cuyahoga Metropolitan Housing Authority v. HUD*, No. C72-1208 (N.D. Ohio, filed Nov. 7, 1972).

64. Memorandum of Decision, *supra* note 61, at 11.

65. CONN. GEN. STAT. § 8-48 (1958).

66. *King v. Smith*, 392 U.S. 309, 333 (1968). Moreover, this type of state law, which sets higher rents for welfare recipients than for other public housing residents, has been invalidated under the Equal Protection Clause by other courts without reference to the Brooke Amendments. See *Luna v. Housing Authority*, No. 969, 666 (L.A. Super. Ct. July 7, 1970); and *Hammond v. Housing Authority and Urban Renewal Agency*, Civil No. 70-264 (D. Ore., Apr. 2, 1971). See generally Note, *Higher Rents for Welfare Recipients in Public Housing: An Analysis Under the Equal Protection Clause*, 45 S. CAL. L. REV. 263 (1972).

67. In contrast to Judge Newman's position on this point is the reasoning of the district court judge in the unreported decision of *Fletcher v. Housing Authority*. Memorandum Opinion Order and Judgment, Civ. Act. No. 7399-g (W.D. Ky., filed March 9,

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tively bar public housing by failing to pass enabling legislation, and city governments may refuse to take advantage of state enabling legislation.⁶⁸ While the liquidation of a housing project would normally require that the bondholders be compensated, the federal government has always guaranteed by statute the annual payment of these LHA bonds regardless of the project's fiscal status.⁶⁹

B. *LHA's v. HUD*

Recently, NAHRO requested an injunction in the nature of mandamus compelling HUD to make up all the operating deficits of LHA's.⁷⁰ The crux of NAHRO's argument is that HUD has a ministerial, *i.e.*, non-discretionary, duty to draw upon the unspent authorizations of past fiscal years.⁷¹ According to the recent holding of a U.S. district court,⁷² however, the statutory framework "does not command

1973) [hereinafter cited as Memorandum Opinion Order and Judgment]. The court in *Fletcher* found that the financial problems of the LHA justified the exclusion of prospective tenants from vacant units solely because their incomes were too low.

If *Fletcher* is interpreted broadly to permit the exclusion of all very poor tenants from public housing, it may be criticized for flaunting legislative history, statutory language, and judicial precedent. The legislative history shows that public housing was intended to "take care of the poorest first," 81 CONG. REC. 8098 (1937), and "to give preference to families with the most urgent housing needs." S. REP. NO. 84, 81st Cong., 1st Sess. 19 (1949). The statute now requires that preference for admission to public housing be given by criteria not necessarily related to income. 42 U.S.C. § 1410(g)(2) (1970). Moreover, this discrimination against the very poor runs counter to judicial precedent in *Thomas v. Housing Authority*, 288 F. Supp. 575 (E.D. Ark. 1967). In that case, the court held that the exclusion of all unwed mothers from public housing violated the Equal Protection Clause because this category is not rationally related to the main purpose of providing safe and sanitary housing for low-income families. *Id.* at 579.

If *Fletcher* is interpreted more narrowly—in light of legislative history, statutory language, and judicial precedent as discussed above—it should mean that LHA's can promulgate admission policies geared to achieving a more even income distribution of tenants, but only within very strict boundaries. Such admission policies must be limited to tenants within the income range statutorily defined for public housing, they cannot categorically exclude tenants on criteria such as race or welfare reciprocity, and they cannot violate the legislative preferences for admission which are often unrelated to income. Under this narrow interpretation of *Fletcher*, LHA's would not be able to use admission policies to increase rental revenues by a sufficient amount to offset operating costs. For example, the "rent range" admission policy used by the LHA in *Fletcher* increased rental revenues by only \$25,000 for a year in which the authority asked for over one million dollars in operating subsidies. Memorandum Opinion Order and Judgment, *supra*, at 6.

68. See Note, *Government Housing Assistance to the Poor*, 76 YALE L.J. 508, 509 (1967).

69. 42 U.S.C. § 1410(e) (1970), as amended, 42 U.S.C.A. § 1410(e) (Supp. 1973).

70. Memorandum of Points, *supra* note 32.

71. NAHRO's argument is premised on HUD's duty to provide safe and sanitary units in public housing. Although HUD normally has discretion in carrying out this duty, there is only one method to resolve the current fiscal crisis—the provision of the maximum sums allowable under § 1410(e) for operating subsidies. Memorandum of Points, *supra* note 32, at 12-26.

72. Order on Plaintiffs' Motion for Preliminary Injunction and Memorandum Opinion, *NAHRO v. Romney*, Civ. Act. No. 2080-72 (D.D.C., filed March 2, 1973) [hereinafter cited as Order and Memorandum Opinion].

HUD to spend or commit all of the contract authority available for a given year."⁷³ Moreover, the idea of drawing upon authorizations from past fiscal years violates the annual basis for public housing finance.⁷⁴

Even if NAHRO could persuade a court that the general authorization for public housing was in effect a specific appropriation for operating subsidies, NAHRO would still face two major legal barriers to success. First, there would be the issue of whether an agency must spend the full amount of its appropriations.⁷⁵ And second, NAHRO would have to persuade a judge that the suit was not a disguised attempt to claim money damages from the government.⁷⁶

III. A Contract Approach to Financing Public Housing

Stymied in seeking to pass increasing costs to tenants or to extract funds from HUD, the LHA's might profitably launch litigation based on a contract theory of HUD-LHA agreements. Agreements with the government for a current or past fiscal year should be treated as binding contract obligations. And to set the level of future subsidies, a funding formula should be established either by Congress or by HUD and NAHRO through collective bargaining.

A. *Contracts Between LHA's and HUD*

LHA's are more like private firms contracting with the federal government than administrative agencies within the federal bureaucracy. Congress originally designed LHA's as independent corporations chartered by states and financed by private bondholders.⁷⁷ Congress

73. *Id.* at 4.

74. The statute is written in terms of maximum sums on an annual basis. 42 U.S.C. § 1410(e) (1970), *as amended*, 42 U.S.C.A. § 1410(e) (Supp. 1973). Congress appropriates money for public housing annually, and HUD approves LHA budgets each year.

75. For a discussion of the current impounding controversy, see *Court Battle Over President's Impounding of Highway Aid Joined by 20 Congressmen*, Wall St. Journal, Jan. 3, 1973, at 5, col. 5, and Complaint, *City of New York v. Ruckelshaus*, Civ. Act. No. 2466-72 (D.D.C., filed Dec. 12, 1972).

76. At least one federal district court has dismissed such a mandamus suit to compel the release of HUD funds on the grounds that it challenged sovereign immunity and should be properly decided by the Court of Claims. *Housing Authority v. HUD*, 340 F. Supp. 654 (N.D. Cal. 1972).

77. The original decision to establish LHA's was prompted by local resentment against the federal Public Works Administration and by a Sixth Circuit decision that slum clearance and construction of low-rent housing were not a legitimate public purpose for the federal exercise of eminent domain. The independent authority form, typified by an unpaid board of commissioners appointed by the mayor, was chosen to insulate the program from "politics" and municipal corruption and to avoid municipal debt limitations. The federal Public Housing Administration (PHA) acts only at the summons of local officials. Note, *supra* note 68, at 509.

The Financing of Local Housing Authorities

stressed their "local autonomy" in a 1959 amendment.⁷⁸ A federal district court recently recognized that the LHA-HUD relationship was contractual rather than administrative by viewing each LHA as "an independent entity which contracts (as a principal) with both the State and Federal Governments."⁷⁹

Under the express contracts (ACC's) signed with HUD,⁸⁰ that Department agrees to provide certain kinds of financial assistance to LHA's if they agree to follow elaborate sets of operational guidelines.⁸¹ Since HUD began paying operating as well as construction subsidies in 1969, the Department has worked through circulars⁸² which have been accorded the legally binding effect of explicit clauses in the ACC's.⁸³ These circulars set forth specific guidelines for LHA's in preparing annual budgets and calculating operating subsidies necessary for the coming fiscal year. Within HUD, area and regional officials approved these budgets, and their signatures should be regarded as incurring binding obligations to pay operating subsidies included in the budgets.⁸⁴

78. Housing Act of 1959, Pub. L. No. 86-372, 73 Stat. 679 (codified at 42 U.S.C. § 1401 (1970)). Congress emphasized the autonomy of LHA's in its reports on the housing bills of 1949 and 1961. See S. REP. NO. 84, 1949 U.S. CODE CONG. SERVICE 1551, 1566; and *Hearings on S. 1478 Before the Subcommittee on Housing of the Senate Committee on Banking and Currency*, 87th Cong., 1st Sess. 229 (1961).

79. *Housing Authority v. Richardson*, 346 F. Supp. 1027, 1033 (1972). The court made this statement in response to an argument that LHA's should not be allowed to sue the government because they were effectively "arms" of the state.

80. The latest version of this ACC is HUD 53011, Nov., 1969.

81. See, e.g., the detailed provisions on construction subsidies, ACC §§ 401-17.

82. In granting substantial sums in operating subsidies, HUD has relied on Forward Funding of Subsidies for Operations: Interim Instructions and Procedures, HM 7475.8, Jan. 27, 1972. This circular was recently replaced in large part by Subsidies for Operations: Low-Rent Public Housing Program, HM 7475.12, Nov. 28, 1972. When HUD granted special family subsidies for operating expenses, it employed the procedures set out in the LOW-RENT HOUSING FINANCIAL MANAGEMENT HANDBOOK (No. 7475.12, June, 1969).

83. See *Thorpe v. Housing Authority*, 393 U.S. 268 (1969), and *Housing Authority v. United States Housing Authority*, Nos. 72-1102 and 72-1185 (8th Cir., filed Sept. 28, 1972). These circulars are considered supplements to the ACC's. *Lefcoe, HUD's Authority to Mandate Tenants' Rights in Public Housing*, 80 YALE L.J. 463, 467 (1971). Such legally binding circulars have been implicitly incorporated into other types of relevant government contracts. *G. L. Christian & Associates v. United States*, 312 F.2d 418 (1963).

84. For example, at the end of the current circular, Subsidies for Operations, *supra* note 82, there is a space for the signatures of the review officer of the area office and the accountant of the regional office. These signatures go below a sum which is marked "Amount of Subsidies for Operations prevalidated and approved for payment." These signatures may be regarded as constituting a binding commitment to the designated sum for operating subsidies. Interview with Mr. John Shaw, Chief of the Financial Management Branch, Program Services Division, HUD Office of Housing Management (Mar. 20, 1973). The two latest circulars, Subsidies for Operations and Forward-Funding, *supra* note 82, were intended to provide LHA's with definite assurances of the designated level of operating subsidy before the start of the fiscal year, *id.*, in contrast to the prior system of discretionary reimbursement of operating deficits at the end of the fiscal year as contained in LOW-RENT HOUSING FINANCIAL MANAGEMENT HANDBOOK (No. 7475.12, June, 1969).

Moreover, HUD proposed an amendment to the ACC's in 1972 requiring LHA's to submit estimates of the "additional annual contributions" needed to make up operating deficits.⁸⁵ If these estimates are approved by HUD area and regional officials, such approval should similarly be regarded as creating binding contracts. HUD was empowered by Congress to make such contract amendments for operating subsidies.⁸⁶ The contracts say: "The faith of the United States is solemnly pledged to the payment of all annual contributions contracted for . . ." and such contract obligations shall be paid "out of any money in the Treasury not otherwise appropriated."⁸⁷

B. *Breach of Contract*

If operating subsidies designated in approved budgets have not been paid in full, LHA's should be able to obtain contract damages against HUD in the Court of Claims.⁸⁸ Several defenses are available to HUD: the government's sovereign immunity, the absence of authority of HUD agents, or the lack of consideration for the operating subsidies. But LHA's may exploit well-recognized exceptions to these defenses.

1. *Sovereign Immunity*

Under the doctrine of sovereign immunity, the government may be sued in contract only if it has consented to be sued.⁸⁹ But in the Tucker Act, the United States consented to be sued for claims "founded either upon the Constitution, or any Act of Congress, or any regulations of an executive department, or upon any express or implied contract with the United States . . ."⁹⁰ Thus, LHA's can sue on the ACC's as an express contract with the United States, or on a

85. See, e.g., Amendment No. 35 proposed by HUD to ACC No. NY-414 of the New Haven Housing Authority.

86. The Housing and Urban Development Act of 1970 § 210, amending 42 U.S.C. § 1410(a) (1964) (codified at 42 U.S.C. § 1410(a) (1970)).

87. ACC § 423.

88. Several leading cases hold that when the Government enters into a contract, it incurs binding obligations just as a private party does. See *Perry v. United States*, 294 U.S. 330, 352 (1935); *Lynch v. United States*, 292 U.S. 571, 579 (1934).

Some LHA's have included a contract claim in their complaint against HUD. See Complaint, *Norfolk Redevelopment and Housing Authority v. HUD*, No. 298-72-N (E.D. Va., filed June 15, 1972). Public housing tenants have also raised contract claims against LHA's and HUD in *Okinello v. Alaska State Housing Authority*, No. A-43372-Civ. (D. Alas., filed Aug. 18, 1972). But tenants in their contract claims against HUD on the ACC's may not be able to obtain standing as third party beneficiaries because ACC § 510 specifically excludes suits by third-party beneficiaries.

89. *Maricopa County v. Valley National Bank*, 318 U.S. 357 (1943); *United States v. Clarke*, 33 U.S. (8 Pet.) 436 (1834).

90. 28 U.S.C. § 1346(a)(2) (1970).

claim founded upon § 1410(e) guaranteeing the "payment of all annual contributions contracted for pursuant to this section."⁹¹

The most serious problem posed by sovereign immunity for the success of contract claims by LHA's against HUD is the notion of a protected sovereign act, as announced in the *Horowitz* case:⁹²

It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign.

The *Horowitz* rule has been severely criticized.⁹³ But regardless of the rule, LHA's could fit within at least two well-established exceptions. First, since the alleged sovereign act was carried out by HUD, the same agency which made the contract, then HUD cannot hide behind its own act under the sovereignty doctrine.⁹⁴ Second, the failure of Congress to appropriate enough money for LHA operating subsidies is not a protected sovereign act if the contract was made according to proper contract procedures.⁹⁵

2. *Actual and Apparent Authority*

HUD could also argue against contract claims on grounds that HUD area and regional agents had no actual authority to bind the Department as principal to the ACC's. To be sure, HUD agents, despite

91. 42 U.S.C. § 1410(e) (1970). See *National Bank of Newark v. United States*, 357 F.2d 704 (Ct. Cl. 1966).

92. *Horowitz v. United States*, 267 U.S. 458, 460 (1925).

93. The fact that the Government, by its own actions can escape contractual liability simply because of the abstract concept of sovereignty offends all sense of equity and fair play.

J. McBRIDE & I. WACHTEL, I GOVERNMENT CONTRACTS § 3.10, at 3-4 (1969). For an incisive critique of impairment of contract by the federal government, see Calabresi, *Retroactivity: Paramount Powers and Contractual Changes*, 71 YALE L.J. 1191 (1962).

94. See, e.g., *Beuttas v. United States*, 11 Ct. Cl. 532 (1943), where the Court of Claims distinguished the *Horowitz* line of cases, saying:

[I]n all of those cases the contracting officer had nothing whatsoever to do with the act complained of, while in the present case it was the very department of the Government that entered into the contracts with plaintiffs

Id. at 537.

95. See J. McBRIDE & I. WACHTEL, IV GOVERNMENT CONTRACTS § 31.60(2), at 31-47 (1969). For example, in *Seatrains v. United States*, 99 Ct. Cl. 272 (1943), a private firm agreed to construct two vessels of a certain type in exchange for a contract from the Postmaster General to carry the mail. But Congress passed a proviso to the appropriations of the Post Office Department which said no part of the appropriations should be paid on the contract with this firm. Nevertheless, the court held for the private contractor, saying:

When Congress delegates to an agency of the Government the right to enter into a contract under certain terms and conditions, and these terms and conditions are fully carried out and a contract is entered into, it becomes a valid, binding agreement of the Government and such valid contract is protected by the Fifth Amendment and cannot be taken away without making just compensation.

Id. at 315.

their authority to make binding financial commitments to individual LHA's, had no authority to promise operating subsidies, which in the aggregate exceeded the total annual appropriations eligible for operating subsidies.⁹⁶ But, while HUD agents may have lacked *actual* authority, they clearly manifested *apparent* authority by signing ACC's and approving LHA budgets.⁹⁷

If HUD were a private party, it would be estopped from arguing that the sums involved in contracts exceeded appropriated funds, and the LHA's would recover approved operating deficits to the extent that they were actually incurred. Apparent authority is not generally applicable against the government.⁹⁸ But the Supreme Court has specifically held in favor of contractors in cases where authorized government agents have contracted for aggregate sums exceeding the relevant congressional appropriation, because:

persons contracting with the Government for partial service under general appropriations are not bound to know the condition of the appropriation account at the Treasury as on the contract book of the Department.⁹⁹

3. *Failure of Consideration*

Finally, HUD could argue that LHA's gave no consideration for HUD's commitment to operating subsidies.¹⁰⁰ But this defense should be invalidated because the consideration in the ACC's is a mutual promise to perform certain acts for the direct benefit of the government—acts which impose serious financial constraints on local housing authorities.¹⁰¹ Doubts as to the existence of adequate consideration

96. In reply to NAHRO's claims that certain LHA's are due more money for operating subsidies, HUD has maintained in part that it has already allocated all eligible funds for public housing. Affidavit of Nathaniel J. Eiseman, Director of HUD Office of Budget, NAHRO v. Romney, Civ. Act. No. 2080-72 (D.D.C., filed Mar. 6, 1973).

97. See generally McIntire, *Authority of Government Contracting Officers: Estoppel and Apparent Authority*, 25 GEO. WASH. L. REV. 162 (1957).

98. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947). This opinion has been severely criticized. See, e.g., Whelan & Dunigan, *Government Contracts: Apparent Authority and Estoppel*, 55 GEO. L. REV. 830, 847-49 (1967).

99. Myerle, Ex'r v. United States, 33 Ct. Cl. 1, 25 (1897). A later court followed the Myerle rule in Schuler & McDonald v. United States, 85 Ct. Cl. 631, 643 (1937); cf. Karno-Smith Co. v. United States, 84 Ct. Cl. 110 (1936).

100. J. McBRIDE & I. WACHTEL, 1 GOVERNMENT CONTRACTS § 1.50 (1969).

101. In the ACC's, the LHA's agree to follow certain housing policies set by HUD. The ACC says: "The Local Authority shall at all times maintain the low-rent character of each of the Projects." ACC § 202. It also says: "The Local Authority shall at all times maintain each Project in good repair, order, and condition." ACC § 209. Some provisions of the ACC's are more related to general governmental goals than HUD's housing policy. LHA's must buy supplies only from American firms. ACC § 303. LHA's "shall take affirmative action" to promote racial, religious, and sexual equality in employment. ACC § 304. The Local Authorities must "pay to the Government a reasonable fixed fee for providing representatives of the Government at the site of each Project in connection with the construction thereof." ACC § 122.

should be resolved against HUD since the ACC's are standard contracts drafted by the Department.¹⁰²

Even if a court should decide that LHA's have provided no consideration, LHA's could still obtain damages by promissory estoppel, under which courts have granted reliance damages on conditional promises of a gift or grant.¹⁰³ When HUD approves budgets of LHA's, it should reasonably foresee that LHA's will rely on them in incurring obligations to private businessmen, leases with tenants, and commitments of rent subsidies to private landlords under the leased units program.¹⁰⁴

C. *Renegotiation of Contracts*

A contract approach to HUD-LHA agreements, though it might win damages for breach of contracts for *past* years, does not provide an adequate solution for *future* LHA financial problems. Were courts to adopt a contract theory, HUD might well refuse approval of annual LHA budgets until Congress granted the Department's appropriations. In its appropriations requests, HUD could simply seek an amount substantially less than the aggregate sum needed to cover operating subsidies. If tradition holds, the Congressional Appropriations Committees, despite their receptivity to funding requests for operating subsidies, would defer to HUD's expertise.¹⁰⁵ With this low appropriation, HUD would then compel LHA's to reduce their operating subsidy requests before the Department would sign their budgets.¹⁰⁶ The LHA-HUD agreements would thus be contractually binding, but effectively inadequate.

A long-term solution requires a restructuring of HUD-LHA relationships to provide for a funding formula as the basis for yearly LHA allocations. The formula, incorporated in all ACC's, would not only be legally binding against HUD, but also would guide the Appropriations Committee in evaluating the sufficiency of HUD funding requests. It would facilitate more rational planning on the part of both LHA's and HUD, by enabling longer-range projection of spend-

102. Standard government contracts should be interpreted against the drafter. 1 J. McBride, *GOVERNMENT CONTRACTS COMMENTATOR* § 2.10[6] (Rel. No. 97, 1973).

103. See *Ricketts, Ex'r v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898).

104. For example, the LHA in Alameda, California, tried to turn back to HUD the leases on 240 leased units because its operating deficit was \$60,000 per year on these units, and HUD was providing only \$37,000 per year in operating subsidies. King, *Cities Lose on Aid for Housing Poor*, N.Y. Times, Nov. 25, 1972, at 17, cols. 2-3.

105. See p. 1214 *supra*.

106. Because of HUD's inadequate request for appropriations in fiscal 1972 and 1973, the department attempted to reduce operating subsidies in the budgets of many LHA's. See Complaint at 16, *NAHRO v. Romney*, No. 2080-72 (D.D.C., filed Oct. 16, 1972).

ing and revenue needs. In a larger sense, it would promote more precise assessments of the quality of public housing to be made available, the costs and the benefits.

The funding formula would be based on a realistic appraisal of the factors influencing the income and revenue of LHA's. These factors would include the rent levels under the Brooke Amendments, the impact of inflation on operating expenses, the cost of qualifying projects under the housing code, and the need for LHA's to maintain operating reserves. Such a formula would differ significantly from the current funding circular¹⁰⁷ and contract amendment proposed by HUD,¹⁰⁸ which are based on a project maximum repealed by Congress¹⁰⁹ as well as an arbitrary cost estimate imposed on HUD by OMB.¹¹⁰ Courts should provide the impetus for a realistic funding formula by invalidating the current HUD circular on operating subsidies, as requested by LHA's in two pending cases.¹¹¹

Two methods would be available to establish a new formula for operating subsidies. LHA's could arrive at a formula through collective bargaining with HUD. Alternatively, Congress could impose a legislative formula on all parties. Under either approach, the formula would be legally binding. While LHA's would continue to submit yearly requests for operating subsidies to area and regional offices of

107. See Subsidies for Operations, *supra* note 55.

108. See note 85 *supra*.

109. See note 56 *supra*.

110. The current HUD circular for computing operating subsidies is arbitrary for two reasons. First, by basing all calculations on fiscal year 1971, the circular locks LHA's into the level of operating expenses which they fortuitously incurred during that particular fiscal year. Second, the current HUD circular says that operating costs should be increased by three percent per year from the baseline of fiscal 1971. Subsidies for Operations, *supra* note 55, at 3a(1). But independent surveys showed that in the latter half of the 1960's operating costs rose annually by almost seven percent, mainly due to inflation. See p. 1213 *supra*. HUD itself estimates an average rise in operating costs of over four percent per year between 1970 and 1973. Interview with Mr. Robert Gair, HUD Office of Budget (March 20, 1973).

111. Supplement to Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction, NAHRO v. Romney, Civ. Act. No. 2080-72 (D.D.C., filed Jan. 2, 1973); and Memorandum of Law of Defendants Housing Authority of the City of New Haven, Edward White, Jr., and Dominic Panagrossi in Support of their Motion for Partial Summary Judgment and in Response to the Motion of Federal Defendant for Judgment on the Pleadings or in the Alternative for Summary Judgment, Barber v. White, Civ. Act. No. 15, 235 (D. Conn., filed March 5, 1973).

There is ample judicial support for invalidating such circulars. Administrative circulars by HUD have recently been struck down because they flaunted legislative intent on other housing programs, *Davis v. Romney*, 41 U.S.L.W. 2446 (E.D. Pa., Feb. 13, 1973). As to the arbitrary cost figures, the judge said in denying a preliminary injunction to NAHRO on its mandamus claim:

The statute gives HUD considerable discretion in allocating subsidy [*sic*] to the local housing authorities. HUD, of course, cannot exercise this discretion in an arbitrary or unreasonable way In an appropriate case, a District Court might order HUD to re-examine the amount of subsidy allocated to a local housing authority.

Order and Memorandum Opinion, *supra* note 72, at 4.

HUD, the only debatable issue would be whether the formula had been applied properly to a specific project.

Collective bargaining seems the most likely method in view of the existing practice.¹¹² Recent negotiations between individual LHA's and HUD have led to some settlements of disputes about operating subsidies.¹¹³ In these negotiations, HUD's bargaining power has been partially balanced by threats of bankruptcy from LHA's,¹¹⁴ fear of destructive violence by public housing tenants,¹¹⁵ and political pressure from influential congressional figures.¹¹⁶ However, these individual negotiations have left out relevant parties such as public housing tenants;¹¹⁷ they have taken on the appearance of covert lobbying rather than legitimate bargaining; and, most importantly, they have accorded HUD a significant advantage against LHA's, which may be played off against each other in the piecemeal allocation of money.¹¹⁸

A formal system of collective bargaining would enable tenants of public housing projects to participate in negotiations through the National Tenants Union, as courts have permitted program beneficiaries to do in the welfare field.¹¹⁹ Negotiations would be all-inclusive and highly visible: Attention of all interested citizens and government officials, not merely of the LHA administrators and their clientele, could be focused on the issue at a particular time.¹²⁰ Most crucially, LHA's would be a far more formidable bargaining force against HUD

112. At least one LHA has already suggested collective bargaining between LHA's and HUD to arrive at a new formula for computing operating subsidies. Letter from Edward White, Jr., Executive Director of New Haven Housing Authority, to Mr. Lawrence L. Thompson, Area Director, HUD, Jan. 31, 1973.

113. For example, the New York Housing Authority reached an agreement with HUD on operating subsidies after "long negotiations." *25,000 Welfare Families in Projects Get Rent Cuts*, N.Y. Times, Feb. 7, 1973, at 44, col. 3.

114. For example, after the LHA in St. Louis announced that all projects would go into federal receivership, HUD gave the LHA needed operating subsidies. 4 NAHRO Letter 3, Dec. 18, 1972 (No. 50).

If a LHA goes bankrupt, the federal government must continue to pay off the construction bonds. 42 U.S.C. § 1410(e) (1970). Historically, projects taken over by the federal government have performed poorly. Lefcoe, *supra* note 83, at 468. However, these projects cannot be easily liquidated since there are few willing purchasers.

115. Bad housing conditions were cited as one of the major causes of the urban riots in the late 1960's. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 81 (1970).

116. NAHRO Takes Action, *supra* note 49.

117. Tenants are relevant parties to such negotiations if only because they can play an important role in reducing maintenance costs. See Note, *Tenant Unions: Collective Bargaining and the Low-Income Tenant*, 77 YALE L.J. 1368, 1375 (1968).

118. Under the present system, the larger and more politically influential LHA's have a strong incentive to demand their operating subsidies before HUD claims that all eligible funds have been given to other housing authorities. HUD is better able to play LHA's off against each other because LHA's operate on four different fiscal years.

119. See National Welfare Rights Organization v. Finch, 429 F.2d 725 (1970).

120. For a discussion of the legitimizing effect of open, formal bargaining in the prison context, see Note, *Bargaining in Correctional Institutions: Restructuring the Relation between the Inmate and the Prison Authority*, 81 YALE L.J. 726, 746 (1971).

by presenting a united front through NAHRO, as indicated by the success of other similar groups in collective bargaining with HUD.¹²¹

If, on the other hand, Congress chose to establish a formula for LHA's and HUD, congressional calculations could be based on hearings and investigations conducted by the Banking and Currency Committees. Congress could then pass a legislative formula for operating subsidies similar to the one for revenue sharing, delineating the factors to be considered and their relative weighting. The formula could be reviewed each year by Congress, and modifications could be made to take into account changes in the public housing program.

Conclusion

Contract theories might be applied to the financing of other public corporations similar to LHA's. For them, as for LHA's, theories of administrative law reinforce the statutory rights of program beneficiaries without requiring adequate government subsidies to finance these statutory rights. Under a funding formula approach, the proper level of government subsidies could be determined by Congress or through negotiations between the corporation and the relevant government agency. Once Congress passed the appropriations mandated by the funding formula, public corporations would have claims based on contract or statute against the government for these operating subsidies. Such an approach would provide public corporations with the financial security needed to benefit from decentralized management, while guaranteeing the government an opportunity to review their activities.

121. Tenant unions won significant improvements in standard lease forms through collective bargaining. See Lefcoe, *supra* note 83, at 463.

APPENDIX

Chart—THE FINANCING OF THE PUBLIC HOUSING PROGRAM: FISCAL YEARS 1970-1973
(all figures expressed in millions of dollars)

(1) Fiscal Year	(2) Total Contract Utilization Approved by Congress	(3) Total Amount Spent on Annual Contributions	(4) Authorization Earmarked for Operating Subsidies	(5) HUD Requests from Appropriations Committees for Operating Subsidies	(6) Congressional Appropriations for Operating Subsidies	(7) HUD Reallocations to Operating Subsidies	(8) Total Appropriations and Reallocations to Operating Subsidies	(9) NAHRO Estimates of LHA Operating Deficits
1970 (1969-70)	879.250	471.611	110	35	35	0	35	54.6
1971 (1970-71)	1,119.250	626.354	185	108	108	10	118	200
1972 (1971-72)	1,424.200	886.00	185	185	185	60	245	288
1973 (1972-73)	1,574.250	1,105.000	335	170	170	100	270	325.4

All figures are as of December 31, 1972. Figures in cols. (1), (2), (3), (5), and (6) are taken from the BUDGET OF THE UNITED STATES, FISCAL YEAR 1973—APPENDIX 489, 511 (1972), and BUDGET OF THE UNITED STATES, FISCAL YEAR 1972—APPENDIX 498 (1971).

Figures for column (4) are based on the \$75 million earmarked in 1969 for "payments to cover existing operating deficits," CONFERENCE REPORT ON HOUSING AND URBAN DEVELOPMENT Act of 1969, H.R. REP. NO. 740, 91st Cong., 1st Sess. 31 (1969). Previously, \$35 million had been authorized for special family subsidies, which were also geared to operating deficits, thus bringing the total authorization for fiscal 1970 to \$110 million for operating subsidies. 2 LAW PROJECT BULLETIN App. A at 2 (No. 6, July 15, 1972). Then in 1970, Congress increased the total authorization earmarked for operating subsidies to \$185 million by making an addition to the authorization, Pub. L. No. 91-609, 84 Stat. 1776, amending 42 U.S.C. § 1410 (1964) (codified at 42 U.S.C. § 1410(e) (1970)) of which \$75 million is to "be used exclusively for operating and maintenance expenses." H.R. REP. NO. 91-1784, 91st Cong., 2d Sess. 58 (1970). In 1972, Congress added another \$150 million in authorization for operating subsidies, bringing the total for operating subsidies to \$335 million. Pub. L. No. 92-503, 86 Stat. 906, amending 42 U.S.C. § 1410(e) (1970) (codified at 42 U.S.C.A. § 1410(e) (Supp. 1973)).

Figures for col. (7) are from an interview with Mr. Harry Bandemer, Acting Director, Low-Rent Program Division, HUD Office of Finance and Accounting (March 20, 1973); the reallocation figures for fiscal 1972 are drawn from Letter from Mr. Norman V. Watson, Assistant Secretary of HUD, to Congressman Herman Badillo, July 18, 1972; and the figures for fiscal year 1973 are from HUD Secretary Romney Adds 100 Million Dollars to Operating Subsidy Funds for Public Housing, NAHRO Bulletin, Oct. 13, 1972.

Figures for col. (8) are the sum of cols. (6) and (7). Figures for col. (9) are from the National Association of Housing and Redevelopment Officials (NAHRO), the group representing all LHAs.

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